COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 01425801**

Charlene Reynolds	Employee
The Rhim Companies	Employer
National Grange Mutual Ins.	Insurer

REVIEWING BOARD DECISION

(Judges Levine, Carroll and McCarthy)

APPEARANCES

Herbert C. Dike, Esq., for the employee at hearing
Wendy L. Micale, Esq., for the employee on brief
Alicia M. DelSignore, Esq., for the insurer

LEVINE, J. The insurer appeals from the decision of an administrative judge in which the employee was awarded a closed period of total incapacity benefits and ongoing partial incapacity benefits. We reverse part of the decision and affirm the remainder.

At the time of the judge's decision, Charlene Reynolds was a single, fortynine year old female with two adult children. (Dec. 897.) Ms. Reynolds worked as the employer's only on-site employee in an office building cafeteria. Her responsibilities included the ordering, unloading and storage of stock, making sandwiches, brewing up to 180 cups of coffee per day and serving customers. (Dec. 897-898.)

On February 15, 2001, while lifting a sixty-pound box of hot chocolate syrup, the employee felt severe back pain and fell to the floor.[1] Despite the pain she continued to work. At the end of the workday, Ms. Reynolds reported her cash total for the day to her boss, and informed her of her back injury. Later that night, the employee's pain worsened. Her roommate called the employee's boss; the employee repeated her story to her boss.

[1] The administrative judge mentions a January 2001 neck pain episode that was treated with a muscle relaxer. (Dec. 898.) It is not clear what circumstances led to the neck pain. Apparently, the neck pain did not result in lost time from work.

The employee reported to work the next day. At lunch time the employee felt pain in her upper and lower back, arms, neck and chest. The pain was so severe that she was taken by ambulance to a hospital. (Dec. 898.)

The employee's treatment included physical therapy and steroid injections. When conservative treatment failed, the employee underwent back surgery on May 29, 2002. Unfortunately, not only did the surgery not alleviate her back pain, but the surgical scar became infected as a result of some old burn scar tissue.[2] Due to the infection, the employee has been subjected to a long healing process involving skin grafts. (Dec. 899.)

As of the hearing date, the employee's arm pain had resolved; her neck pain comes and goes. Her back pain remains constant; she is unable to lie on her back. The employee's right leg occasionally goes numb. She is unable to drive for long periods of time and does little more than watch television and talk to her neighbor. The employee does not believe she could do any of her previous jobs. (Dec. 899.)[3] The employee's claim for workers' compensation was denied at conference, and she appealed to a hearing de novo. On January 17, 2002, pursuant to § 11A, Dr. Andrea J. Wagner examined the employee. The parties deposed the impartial examiner and both the medical report and deposition testimony were admitted into evidence. (Dec. 896, 897.) The judge allowed three additional medical reports for the limited purpose of showing that the employee had made inconsistent statements. (Dec. 897.)

The impartial physician diagnosed C5-6 disc herniation, lumbosacral radiculopathy, cervical disc-spine disease, lumbar disc-spine disease, cervical strain and lumbar strain. (Rep. of § 11A Examiner, 2-3; Dep. 9; Dec. 900.) She causally related only the cervical and lumbar strains and the C5-6 herniation to the subject industrial injury. (Rep. of § 11A Examiner, 3; Dec. 900.) The impartial physician also opined that the employee was partially disabled and that she should be restricted to lifting no more than twenty pounds and no repetitive flexion, extension or rotation of the cervical and lumbar spine. (Rep. of § 11A Examiner, 3; Dep. 10; Dec. 900.)

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[2] The employee was badly burned in a childhood accident. (Dec. 897.)

[3] In addition to her work at Rhim, the employee's work history includes employment as a nanny, a grill cook, a housekeeper and dietary aide at a nursing home facility. (Dec. 897.)

The judge adopted the opinions of the impartial physician, credited the testimony of the employee and found that the employee sustained a work-related injury to her neck and lumbar spine on February 15, 2001. The judge found that, as a result, the employee has been partially incapacitated with the exception of a closed period of temporary total incapacity following back surgery. (Dec. 900-901.) Accordingly, the judge ordered the insurer to pay (1) a closed period of § 34 temporary total incapacity benefits and ongoing § 35 benefits; (2) all reasonable and necessary medical treatment; and (3) legal fees/expenses to employee's counsel. (Dec. 901-902.)

On appeal, the insurer first argues that the evidence does not support the claim of a February 15, 2001 workplace injury. We summarily affirm the decision on this issue. Next, the insurer contends that the evidence did not warrant liability for the lumbar injury and the lumbar surgery. (Insurer's brief, 5.) However, as just pointed out, the impartial physician causally related the lumbar strain to the February 20, 2001 industrial injury. Her opinion, adopted by the judge, did not change during her deposition. (Dep. 26.) Therefore, we affirm the decision on that issue.[4] With regard to the May 2002 back surgery and the corresponding period of temporary total incapacity, however, we agree with the insurer that the evidentiary record does not support the award related to the back. The impartial physician stated unequivocally that, as of her January 2002 examination, the surgery was not warranted. (Dep. 24-25, 32.) Accordingly, we reverse the award of § 34 temporary total incapacity benefits and the award of §§ 13 and 30 benefits, to the extent they include payment for the back surgery.

Finally, the insurer argues that the employee did not prove that the alleged February 2001 injury to her neck remained a major cause of her current disability as required by § 1(7A).[5] At hearing, the insurer did raise § 1(7A). (Dec. 895; Tr. 3.) The judge's failure to

[4] The insurer does not challenge the extent of the employee's partial incapacity. Indeed, the impartial physician, when asked to assume that the employee suffered no back injury, still opined that the employee should do "no flexion/extension or rotation of the cervical spine." (Dep. 29-30.)

[5] General Laws c. 152, § 1(7A), states in pertinent part as follows:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be

address § 1(7A) would ordinarily require recommital. See G. L. c. 152, § 11B (decisions "shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision"). However, since the exclusive prima facie medical testimony of the impartial physician satisfies the applicable causation standard under § 1(7A) -- "a major but not necessarily predominant cause" -- recommittal is unnecessary. See Roney's Case, 316 Mass. 732, 739-740 (1944)(there may be instances in which the evidence is of such character that findings of fact are not required).

The impartial physician opined that the employee suffered from multiple diagnoses involving her cervical and lumbar areas, some of which were work related -- such as the cervical herniation -- and some of which were not -- such as the degenerative changes. (Rep. of § 11A examiner, 3; Dep. 9.) The doctor, however, was clear in stating that all of the diagnoses contributed to the employee's partial medical disability. (Dep. 10.) The doctor then quantified the causal connection as follows:

> Q: In your conclusion that she was temporarily partially disabled, we had talked previously as to whether she was temporarily partially disabled due to the back strain versus the degenerative condition.
>
> A: Well, she had a herniated disc. I mean, I think I saw the main issue here as the C5-6 herniated disc. The other conditions to me were secondary.

(Dep. 22.) As noted above, the impartial physician causally related the employee's herniated cervical disc to the industrial injury. As it was "the main issue" in the employee's disability, and all of the other causes "were secondary," the § 1(7A) standard of showing the work injury to be "a major cause" of disability was satisfied as a matter of law. See Nee v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 265, 268 (2002)(medical testimony that work injury was "a good cause" can satisfy § 1(7A) standard of "a major cause").

Accordingly, we affirm the decision, with the exception that any award of § 30 benefits for the lumbar surgery is reversed, along with the closed period of § 34 benefits following that May 29, 2002 surgery. We order that the judge's award of § 35 benefits that preceded the surgery, and continued after July 23, 2002, apply to and replace the closed period of

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> compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

reversed § 34 benefits. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,276.27.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative law Judge

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Filed: July 6, 2004